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Clarity and Confusion: RICO's Recent Trips to the United States Supreme Court

Randy D. Gordon*

The complicated structure of the Racketeer Influenced and Corrupt Organization Act has bedeviled courts and litigants since its adoption four decades ago. Two questions have recurred with some frequency. First, is victim reliance an element of a civil RICO claim predicated on allegations of fraud? Second, what is the difference between an illegal association-in-fact and an ordinary civil conspiracy? In a series of three recent cases, the United States Supreme Court brought much needed clarity to the first question. But in another recent case, the Court upended decades of circuit-court precedent holding that an actionable association-in-fact must embody a set of structural attributes that would not ordinarily be present in a conspiracy. This Article analyzes these new cases, puts them in historical context, and discusses their likely ramifications for civil RICO litigation.

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I. INTRODUCTION

Over the last five years, the United States Supreme Court has taken and decided four Racketeer Influenced and Corrupt Organizations Act (RICO) cases¹—a significant number for a narrow corner of the law. Three of the cases bring significant clarity to the question of whether a fraud-based civil RICO claim will lie where the plaintiff was not the recipient of the alleged fraudulent statements.² The other case radically redefines the outward bounds of a RICO “enterprise,” which will have enormous consequences for criminal and civil RICO cases alike.³ In some ways, these two categories of cases are representative of the tensions that arise between and within courts that at once embrace criminal RICO as an effective law enforcement tool and disdain civil RICO as a plaintiff-friendly boondoggle.⁴ So lower courts and practitioners must continue, for now, to wrestle with the twin vagaries wrought by the language of the statute itself and the Supreme Court’s failure to fashion full normative coherence between RICO’s criminal and civil strands.

II. UNTANGLING RICO

As I have argued elsewhere, and will not belabor here, the structural complexity and expansive language of the RICO statute, when coupled with the different (and often competing) policy aims

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 92 (codified as amended at 18 U.S.C. §§ 1961-1968 (2006)); see *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010); *Boyle v. United States*, 129 S. Ct. 2237 (2009); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

2. See *Hemi*, 130 S. Ct. at 985; *Bridge*, 533 U.S. at 641-42; *Anza*, 547 U.S. at 458-61.

3. See *Boyle*, 129 S. Ct. at 2237.

4. See, e.g., Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 WASH. & LEE L. REV. 83, 92-93 (2002).

behind criminal law enforcement and civil litigation, have forced courts to interpret the statute in ways that would make it effective, yet bounded.⁵ In one respect, this interpretive conundrum is simply an instantiation of the routine task that courts are well enough equipped to handle when faced with vague or overly expansive statutory terms. For example, courts quickly recognized that section 1 of the Sherman Antitrust Act would, if applied literally, make all contracts illegal and therefore placed a “reasonableness” gloss on the statutory text.⁶ But the interpretive dilemmas that RICO poses are not so easily resolved for at least two reasons: one structurally grounded and one policy grounded.

First, RICO has a complicated structure. A plaintiff attempting to state a civil RICO claim must show that he was injured “by reason of” a criminal RICO violation, which requires that he plead such a violation, which in turn requires him to identify the predicate commission of certain specified crimes (e.g., mail or wire fraud) and satisfy certain defined terms (e.g., pleading the existence of an “enterprise”).⁷ To describe this structure is to demonstrate both its complexity and difficulty.

Second, the government enforcement and private litigation aims under RICO overlap less than, for instance, they do under the federal antitrust laws. Mainly, criminal and civil litigation tend to target (and in the case of tag along suits actually track) the same type of behavior.⁸ In fact, the difference is one of degree rather than kind: federal enforcement targets “hard core” violations like price fixing, whereas private litigation in addition sweeps in actions such as tying, boycotts,

5. See generally Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171 (2007) [hereinafter Gordon, *Crimes That Count Twice*]; Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. § 1962(c)*, 39 U.S.F. L. REV. 319 (2005) [hereinafter Gordon, *Rethinking Civil RICO*].

6. See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66-67 (1911).

7. See, e.g., *Zellner v. Monroe Cnty. Mun. Waste Mgmt. Auth.*, No. 3:07-CV-1976, 2008 WL 2962595, at *7 (M.D. Pa. July 28, 2008); *Johnson v. GEICO Cas. Co.*, 516 F. Supp. 2d 351, 361 (D. Del. 2007); *D'Addario v. Geller*, 264 F. Supp. 2d 367, 388 (E.D. Va. 2003); see also Gordon, *Rethinking Civil RICO*, *supra* note 5, at 323-24.

8. E.g., *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (describing FTC enforcement proceedings against title insurance companies followed by private “tag-along” antitrust class actions); see also Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) (“No sooner does the Antitrust Division bring a case, but the states, and now the European Union, are likely to join the fray, followed at a distance by the antitrust plaintiffs’ class-action bar.”).

price discrimination, and exclusive dealing, all of which are easily recognizable as potential *antitrust* violations.⁹

RICO, in contrast, presents two very different faces. Government prosecutions, on the one hand, look very much like what one would expect from an antiracketeering, anti-Mafia statute: typical indictments target drug distribution rings, interstate bank robbery gangs, or the organized infiltration of a union or pension fund.¹⁰ Private RICO litigation, on the other hand, rarely involves Hollywood-style mobster activity: typical complaints turn on allegations of fraud in insurance, franchise, or other commercial transactions.¹¹

One might ask why antitrust litigation is relatively contained and RICO litigation is not. One answer is that, although RICO's private right of action provision is modeled on section 4 of the Clayton Act,¹² the Supreme Court has read the two provisions quite differently. For example, in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, the Court held that a private plaintiff, in addition to showing a substantive antitrust violation that the government could pursue, must also show "antitrust injury."¹³ Early on, courts placed a similar gloss on RICO § 1964(c),

9. See generally Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 307-10 (2004); Kathryn K. Dyer & Garrett M. Liskey, *Antitrust Violations*, 45 AM. CRIM. L. REV. 195, 196 (2008).

10. E.g., *Boyle v. United States*, 129 S. Ct. 2237, 2241 (2009) (bank robbery gang); *United States v. Daidone*, 471 F.3d 371, 373 (2d Cir. 2006) (loan sharking, extortion, witness tampering, and murder); *United States v. Polanco*, 145 F.3d 536, 538-39 (2d Cir. 1998) (gun and drug distribution, murder).

11. E.g., *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 986 (2010) (fraud in connection with collection of sales taxes); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 639 (2008) (fraud and bid rigging); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 454 (2006) (fraud in connection with collection of sales taxes); see also *Wal-Mart Stores, Inc. v. Watson*, 94 F. Supp. 2d 1027, 1031 (W.D. Ark. 2000) ("[A] high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims." (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997))). As of 1985, "of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 n.16 (1985) (quoting ABA SECTION OF CORP., BANKING, & BUS. LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55-56 (1985)). Additionally, "[r]oughly two fifths of all federal civil actions under RICO are based on charges that the defendant committed mail or wire fraud." Horace D. Nalle, Jr., *Civil RICO Claims Predicated on Mail or Wire Fraud: The Indispensability of Reliance*, 109 BANKING L.J. 272, 272 (1992) (footnote omitted).

12. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267 (1992) ("We have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." (citations omitted)). Compare 18 U.S.C. § 1964(c) (2006) with Clayton Act § 4, 15 U.S.C. § 15 (2006).

13. 429 U.S. 477, 489 (1977).

demanding pleading and proof of “racketeering injury.”¹⁴ But the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co.*, soon removed this and similar collars that the lower courts placed on civil RICO.¹⁵ Thereafter, the path was clear for plaintiffs to bring civil claims that had nothing to do with the prototypical crimes of gangsters (murder, arson, extortion, etc.); allegations of fraud facilitated by two uses of mail or wires would be enough to get a party started.¹⁶

With the dampers on RICO’s civil scope removed, lower courts attempted to stanch the litigation flow in two ways. First, the courts began to give new bite to the “by reason of” requirement of § 1964(c).¹⁷ Second, the courts began to focus on the “enterprise” element of § 1962, especially when the plaintiff alleged that the enterprise was an “association-in-fact” (as opposed to a formal business organization like a corporation or partnership).¹⁸

14. *E.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 495 (2d Cir. 1984), *rev’d*, 473 U.S. 479, 486 (1985).

15. 473 U.S. at 486.

16. *See generally* Douglas E. Abrams, *Civil RICO’s Cause of Action: The Landscape After Sedima*, 12 TUL. MAR. L.J. 19, 23-24 (1987); John E. Grenier & Sally S. Reilly, *Civil RICO—The Scope of Coverage After Sedima*, 47 ALA. LAW. 260, 262 (1986); David A. Furlow, *Civil RICO Comes to Texas: A Review of Civil RICO Jurisprudence in the Fifth Circuit and in the Federal District Courts of Texas*, 37 BAYLOR L. REV. 841, 844 (1985); William H. Rivoir, III, *Civil RICO—The Supreme Court Opens the Door to Commercial Litigation*, 90 COM. L.J. 621, 621 (1985).

17. *E.g.*, *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 728-29 (8th Cir. 2004) (interpreting the “by reason of” requirement to “mean[] causation under the traditional tort requirements of proximate or legal causation, as opposed to mere factual or ‘but for’ causation” (internal quotation marks omitted)); *see also* Laura Ginger, *Causation and Civil RICO Standing: When Is a Plaintiff Injured “by Reason of” a RICO Violation?*, 64 ST. JOHN’S L. REV. 849, 850-51, 864-66 (1990) (discussing the various interpretations by lower courts of the “by reason of” requirement after *Sedima*).

18. *See, e.g.*, *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995) (“[A]ssociation-in-fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure.” (internal quotation marks omitted)); *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (finding that although defendants were involved in a conspiracy, “it is not an enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies”); *Elliott v. Fofas*, 867 F.2d 877, 881 (5th Cir. 1989) (requiring plaintiffs to “plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts”).

III. PROXIMATE CAUSATION AND THIRD-PARTY RELIANCE:

*HOLMES, ANZA, BRIDGE, AND HEMI*A. *The General Standard for Proof of Causation Provided by Holmes*¹⁹

Private plaintiffs may recover for RICO violations only if they can demonstrate injury “by reason of”²⁰ those violations, a standard that the Supreme Court first interpreted in *Holmes v. Securities Investor Protection Corp.*²¹ In *Holmes*, the plaintiff, Securities Investor Protection Corporation (SIPC), an insurer, paid several million dollars to cover claims of customers of two failed broker-dealers.²² SIPC alleged that dozens of defendants concocted a fraudulent stock-manipulation scheme that caused the failure of the two broker-dealers.²³ SIPC sued as the subrogee of customers who had *not* purchased the manipulated securities but who nevertheless suffered collateral injury when the broker-dealers collapsed.²⁴ The Court was thus called upon to decide whether a plaintiff has standing to sue for a RICO violation that proximately injures a third party and also derivatively injures the plaintiff.²⁵ The legal question presented was stated in the familiar terminology of tort law causation: is but for causation sufficient to confer standing under § 1964(c)?²⁶

As a threshold matter, the Court acknowledged that the statute’s “language can ... be read to mean that a plaintiff is injured ‘by reason of’ a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant’s violation was a ‘but for’ cause of plaintiff’s injury.”²⁷ The Court rejected this reading because: (1) § 1964(c) is modeled on

19. This Part borrows from Gordon, *Rethinking Civil RICO*, *supra* note 5, at 329-32.

20. 18 U.S.C. § 1964(c) (2006) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . .”).

21. 503 U.S. 258, 272-74 (1992).

22. *Id.* at 261-63.

23. *Id.* at 262.

24. *Id.* at 263 n.5.

25. *See id.* at 265 n.7. The petition to the Court for certiorari stated the question as:

Whether a party which was neither a purchaser nor a seller of securities, and for that reason lacked standing to sue under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, is free of that limitation on standing when presenting essentially the same claims under the Racketeer Influenced and Corrupt Organizations Act.

Id.

26. *See id.* at 266-67 n.12.

27. *Id.* at 265-66 (footnote omitted).

section 4 of the Clayton Act,²⁸ which provides a private right of action for violations of the antitrust laws;²⁹ and (2) section 4 was held to “incorporate common-law principles of proximate causation.”³⁰ The *Holmes* Court thus concluded this reasoning should extend to § 1964(c):

We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act’s § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.³¹

In sum, as a matter of consistency, “[p]roximate cause is thus required.”³²

The Court did not, however, articulate a test for determining proximate cause.³³ As a consequence, after *Holmes*, it was clear that injury arising “merely from the misfortunes visited upon a third person” will “stand at too remote a distance to recover.”³⁴ But at the

28. See Clayton Act of 1914, ch. 323, § 4, 38 Stat. 731 (codified as amended at 15 U.S.C. § 15 (2006)); *Holmes*, 503 U.S. at 267 (“We have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act, which reads in relevant part that ‘any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.’” (alteration in original) (citations omitted) (quoting 15 U.S.C. § 15)).

29. *Holmes*, 503 U.S. at 266 (“This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading.” (footnote omitted)).

30. See *id.* at 267-68 (stating that Congress’s use of § 7 language in § 4 has been interpreted by the Court to indicate the same congressional intent, and therefore the Court has previously held that § 4 required a showing of proximate causation).

31. *Id.* at 268 (citations omitted).

32. *Id.*

33. *Id.* (referring the lower courts to “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts”). The Court also observed, “At bottom, the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient.’” *Id.* (quoting PROSSER & KEETON ON THE LAW OF TORTS § 41, at 264 (W. Page Keeton et al. eds., 5th ed. 1984)). The Court went on to say, “Accordingly, among the many shapes this concept took at common law, was a demand for some direct relation between the injury asserted and the injurious conduct alleged.” *Id.* (citation omitted).

34. *Id.* at 268-69; see also 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 99-100 (3d ed. 1903). Sutherland states:

Where the plaintiff is injured by the defendant’s conduct to a third person it is too remote, if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing

same time, the Court stated that it could “not rule out” that nonrecipients of misrepresentations could state a claim of fraud.³⁵ Without specific guidance on the point, lower courts oscillated across the ground between these two poles and never achieved a consensus as to the meaning of *Holmes* or a uniform approach even to recurring instances of third-party fraud.³⁶

the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose.

Id. (emphasis added).

35. *Holmes*, 503 U.S. at 272 n.19.

36. In deciding *Bridge v. Phoenix Bond & Indemnity Co.* in 2008, the Supreme Court recognized the split between circuits on the issue of reliance and third-party fraud left open by *Holmes*. 553 U.S. 639, 646 (2008). Citing the Seventh Circuit decision it affirmed, the Court noted that the “[t]hree other circuits that have considered this question agree . . . that the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements.” *Id.* (alterations in original) (internal quotation marks omitted) (citing *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd on other grounds*, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Sys. Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002); *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994)). The Court also noted that “two Circuits hold that the plaintiff must show that it in fact relied on the defendant's misrepresentations.” *Id.* (citing *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-61 (11th Cir. 2002); *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 701 (6th Cir. 2000)). The decisions in the lower courts reflect this split between the circuits created by the uncertainty in *Holmes*. See, e.g., *Loiselle*, 303 F.3d at 104 (“[R]eliance is a specialized condition that happens to have grown up with common law fraud. Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way There is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO.”); *Commercial Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 381-82 (2d Cir. 2001) (finding that plaintiff adequately stated a direct, proximate relationship between its injury and defendant's pattern of racketeering activity, while noting that the “‘direct relation’ requirement generally precludes recovery by a ‘plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts’” (alteration in original) (quoting *Holmes*, 503 U.S. at 268)); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564-65 (5th Cir. 2001) (noting, “[i]n general, fraud addresses liability between persons with direct relationships—assured by the requirement that a plaintiff has either been the target of fraud, or has relied upon the fraudulent conduct of defendants,” but concluding “[that] if [plaintiff's] customers relied on the fraudulent rumor in making decisions . . . this reliance suffices to show proximate causation” (internal quotation marks omitted)); see also *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3d Cir. 1998) (holding that when a plaintiff's relationship with a third party was the direct target of an alleged scheme, the plaintiff may pursue a RICO claim); *Johnson Enters. of Jacksonville v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (finding that because misrepresentations the defendants allegedly made were directed at a third party, not the plaintiff, the plaintiff lacked standing under § 1964(c) to prosecute a claim based on these misrepresentations); *Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995) (“[T]here is no doubt that a producer injured by a campaign of misinformation directed at its customers suffers an injury compensable under the law of torts; it is not cut off by the proximate-causation and foreseeability requirements RICO similarly allows suits when the predicate offenses influence customers and, derivatively, injure business rivals.”); *Mid Atl. Telecom*, 18 F.3d at 263-64 (holding that the plaintiff could bring a RICO claim against defendant, whose actions allowed it to offer lower

B. Defining the Relationship Between Reliance and Causation:
Anza

Holmes may have definitively settled the then-open question of whether both but for and proximate causation must be pled and proven in a civil RICO case. But it did little to indicate exactly how plaintiffs must do so, especially in misrepresentation cases.³⁷ Finally, after fifteen years, the Court stepped back into the fray and began to clarify the muddle that had been created in the lower courts.³⁸

In *Anza v. Ideal Steel Supply Corp.*, the Court considered whether a competitor can be “injured in his business or property by reason of a violation” within the meaning of § 1964(c),³⁹ if the alleged predicate acts of racketeering activity are mail and wire fraud but the competitor was not the party defrauded and did not rely on the fraudulent behavior.⁴⁰ Expanding on its holding in *Holmes*,⁴¹ the Court answered the question in the negative.⁴²

Ideal Steel Supply Corporation (Ideal) sued its chief competitor, National Steel Supply, Inc., (National) and National’s owners and

rates and lure away plaintiff’s customers, even though defendant claimed any damages were sustained by the customers, not the plaintiff); *Cent. Distribs. of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (holding that “fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff,” thus precluding the plaintiff’s RICO claim); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (noting that because “[t]he phrase ‘by reason of’ requires that there be a causal connection between the prohibited conduct and plaintiff’s injury,” to prove causation it was necessary for the county to demonstrate at trial that defendant’s misrepresentations were relied upon by the State Public Service Commission, and that the misrepresentations caused defendant’s rate increases to be granted (internal quotation marks omitted)).

37. This Part borrows from Gordon, *Rethinking Civil RICO*, *supra* note 5, at 332-34.

38. *Id.*

39. 18 U.S.C. § 1964(c) (2006) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . .”).

40. *Anza*, 547 U.S. at 458. For a fuller discussion of this case, see Gordon, *Crimes That Count Twice*, *supra* note 5, at 192-98, and Randy D. Gordon & Samuel E. Joyner, *Annual RICO Update*, TEX. BUS. LITIG. J., Summer 2006, at 9-13.

41. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (holding that a plaintiff may sue under § 1964(c) of the RICO Act only if the alleged RICO violation was the proximate cause of the plaintiff’s injury).

42.

A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant’s aim was to increase market share at a competitor’s expense. When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries. In the instant case, the answer is no. We hold that Ideal’s § 1962(c) claim does not satisfy the requirement of proximate causation.

Anza, 547 U.S. at 460-61 (citations omitted).

operators, Joseph and Vincent Anza.⁴³ Ideal alleged that National did not charge New York's sales tax to cash-paying customers, thus allowing it to reduce its prices without affecting its profit margin.⁴⁴ Further, National allegedly submitted fraudulent state sales tax reports that intentionally omitted information concerning National's cash transactions.⁴⁵ Ideal claimed that by submitting these fraudulent tax returns to conceal its conduct, National committed various acts of mail and wire fraud violating § 1962(c).⁴⁶ Ideal alleged that, under § 1964(c), it was injured "by reason of" National's scheme to avoid state sales taxes and gain a competitive advantage over Ideal.⁴⁷

Applying the principles of *Holmes*, the Supreme Court concluded that Ideal could not maintain its § 1962(c) claim.⁴⁸ The Court explained that "the compensable injury flowing from a violation of that provision 'necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.'"⁴⁹ Here, Ideal alleged that the Anzas conducted National's affairs through a pattern of mail fraud and wire fraud.⁵⁰ According to the Court, "The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result."⁵¹ The Court found that while "Ideal assert[ed] it suffered its own harms when [National] failed to charge customers for the applicable sales tax[,] [t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."⁵²

43. *Id.* at 453-54.

44. *Id.* at 454.

45. *Id.*

46. *Id.* Ideal also brought a claim under § 1962(a), alleging that National had earned profits by its "cash, no tax" scheme and used the profits to open an outlet in close proximity to Ideal's sales facility. *Id.* at 455; *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 255 (2d Cir. 2004). Section 1962(a) makes it unlawful for any person who has received income derived from a pattern of racketeering activity "to use or invest" that income "in acquisition of any interest in, or the establishment or operation of," an enterprise engaged in or affecting interstate or foreign commerce. 18 U.S.C. § 1962(a) (2006). According to Ideal, the opening of National's new facility caused Ideal to lose "significant business and market share." *Anza*, 547 U.S. at 455.

47. *See Anza*, 547 U.S. at 457-58.

48. *Id.* at 457.

49. *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)).

50. *Id.* at 458.

51. *Id.*

52. *Id.* The Court further reasoned:

In contemplating the underpinnings of the directness requirement, the Court identified several factors that reinforced its conclusion. First, the Court noted “the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action.”⁵³ For example, the Court explained that while “[t]he injury Ideal alleges is its own loss of sales resulting from National’s decreased prices for cash-paying customers,” National “could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud.”⁵⁴ Additionally, “Ideal’s lost sales could have resulted from factors other than [National’s] alleged acts of fraud.”⁵⁵ Second, “[t]he attenuated connection between Ideal’s injury and [National’s] injurious conduct thus implicates fundamental concerns expressed in *Holmes*.”⁵⁶ The Court was particularly troubled by “the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim.”⁵⁷ A district court would need to calculate “the portion of National’s price drop attributable to the alleged pattern of racketeering activity,” and then “calculate the portion of Ideal’s lost sales attributable to the relevant part of the price drop.”⁵⁸ According to the Court, “The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.”⁵⁹ Third, “the immediate victims of an alleged RICO violation can be expected to

The attenuation between the plaintiff’s harms and the claimed RICO violation arises from a different source in this case than in *Holmes*, where the alleged violations were linked to the asserted harms only through the broker-dealers’ inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.

Id.

53. *Id.*

54. *Id.* The court listed several other potential motivating factors. *Id.* Namely, National could have “received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin.” *Id.*

55. *Id.* at 459. The court noted, “Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal’s lost sales were the product of National’s decreased prices.” *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 460; *see also* *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992) (“[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts . . .”). The Court added, “It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.” *Anza*, 547 U.S. at 460.

vindicate the laws by pursuing their own claims.”⁶⁰ In this instance, if Ideal’s allegations were true, the State of New York could “be expected to pursue appropriate remedies.”⁶¹ According to the Court, there was “no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.”⁶²

It bears repeating that the Supreme Court expressly rejected the notion that “intent” is a proxy for proximate cause.⁶³ Writing for a seven-member majority, Justice Anthony Kennedy declared:

This rationale does not accord with *Holmes*. A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant’s aim was to increase market share at a competitor’s expense. When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injur[y]. In the instant case, the answer is no.⁶⁴

The Court thus rejected Ideal’s § 1962(c) claim, holding that any harm Ideal suffered from National’s alleged actions was too indirect to support the claim.⁶⁵

Anza certainly clarified prior Supreme Court precedent requiring that a plaintiff be directly injured by the alleged RICO predicate acts.⁶⁶ But it left open some important questions: e.g., whether a claim of third-party fraud automatically fails for want of first-party reliance, or whether foreseeability of harm can be sufficient to establish directness of injury. The results following on the heels of *Anza* showed, by and

60. *Anza*, 547 U.S. at 460; see also *Holmes*, 503 U.S. at 269-70 (“[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.”).

61. *Anza*, 547 U.S. at 460.

62. *Id.* The Court reached this conclusion in part by reasoning that the adjudication of the State’s claims would be relatively straightforward, while Ideal’s claims would be difficult to prove. *Id.*

63. *Id.*

64. *Id.* at 460-61 (citation omitted).

65. *Id.* The Court also vacated the Second Circuit’s judgment with respect to Ideal’s § 1962(a) claim. *Id.* at 461-62. This claim alleged that National’s tax scheme provided it with funds to open a new store that attracted customers who otherwise would have purchased from Ideal. *Id.* at 455. Without addressing § 1964(c) causation, the Second Circuit held that this claim was adequately pleaded. See *id.* at 462. The Supreme Court refused, however, to consider Ideal’s § 1962(a) claim “without the benefit of the Court of Appeals’ analysis” regarding whether National’s alleged RICO violation proximately caused the injuries Ideal asserted. *Id.*

66. *Id.* at 459-60.

large, a choke hold on anything other than cases of straightforward, first-party fraud.⁶⁷

C. Redefining the Relationship Between Reliance and Causation: Bridge

To the extent that *Anza* could be read to mean that allegations of third-party fraud cannot support a civil RICO claim, the Supreme Court's very next RICO case, *Bridge v. Phoenix Bond & Indemnity Co.*, put that worry to rest.⁶⁸ Boiled to its essence, the case arose out of a bid-rigging scheme involving tax liens. Cook County, Illinois, like many governmental subdivisions with taxing authority over property, accumulates liens for unpaid taxes. Rather than hold the liens for extended periods, the county periodically holds public auctions at

67. See, e.g., *Brown v. Cassens Transp. Co.*, 492 F.3d 640, 643-46 (6th Cir. 2007), *vacated*, 128 S. Ct. 2936, *rev'd on remand*, 546 F.3d 347, 357 (6th Cir. 2008) (finding that employees' claims that employer's mail- and wire-fraud scheme to deny them worker's compensation benefits failed because they did not plead reliance); *James Cape & Sons v. PPC Constr. Co.*, 453 F.3d 396, 403-04 (7th Cir. 2006) (relying on *Anza* and affirming the district court's dismissal of claims for lack of proximate causation and noting that a direct causal connection is especially warranted where immediate victims can be expected to pursue their own claims); *G & G TIC, LLC v. Ala. Controls, Inc.*, No. 4:07-CV-162, 2008 WL 4457876, at *4-5 (M.D. Ga. Sept. 29, 2008) (dismissing contractor's RICO claims and finding that the case is more analogous to *Anza* than to *Bridge* because the party directly injured by the defendants' alleged conspiracy to defraud the government through a bidding scheme was not the contractor, but the government, and the contractor's injuries were cast in doubt by the fact that the defendant did not win all the contracts); *Chaz Concrete Co. v. Codell*, No. 3:03-52-KKC, 2007 WL 1741934, at *11-12 (E.D. Ky. June 14, 2007), *rev'd*, 545 F.3d 407 (6th Cir. 2008) (dismissing plaintiffs' claims that they were injured by the defendants' misrepresentations to a state agency for failure either to plead reliance or provide evidence of reliance as required under *Anza*); *Leasure v. AA Advantage Forwarders*, No. 5:03-CV-181-R, 2007 WL 925829, at *9-10 (W.D. Ky. Mar. 23, 2007) (interpreting *Anza* as "emphasizing that under RICO's proximate cause analysis set out in *Holmes*, a RICO plaintiff may not recover for damages sustained by a third party" and consequently finding that the "[p]laintiff cannot recover under RICO for any harms he may have indirectly sustained as a result of the alleged direct injuries incurred by the United States Government"); *Uni-Rty Corp. v. Guandong Bldg., Inc.*, 464 F. Supp. 2d 226, 231 (S.D.N.Y. 2006) (finding plaintiffs failed to allege proximate cause when their injury would have occurred regardless of defendant's conduct); *Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d 379, 387 (D.N.J. 2006) (finding that when the plaintiff's asserted injury (underpayment of wages) was distinct from the alleged RICO violation (harboring, transporting and encouraging illegal aliens) plaintiff failed to show proximate cause); *Corporate Healthcare Fin., Inc. v. BCI Holdings Co.*, 444 F. Supp. 2d 423, 429 (D. Md. 2006) ("[A] civil RICO complaint is vulnerable to a motion to dismiss if it fails to allege . . . an adequate causal nexus between [plaintiff's] injury and the predicate acts of racketeering activity alleged."); *Downstream Envtl., LLC v. Gulf Coast Waste Disposal Auth.*, No. H-05-1865, 2006 WL 1875959, at *7 (S.D. Tex. July 5, 2006) (finding that where the cause of plaintiff's asserted injury (competitor charging lower prices) was distinct from the alleged RICO violations (competitor operating without a required license), plaintiff could not meet the proximate-cause requirement).

68. 553 U.S. 639, 650-60 (2008).

which it sells the liens.⁶⁹ At the auctions, prospective purchasers do not actually make cash bids for the liens, but instead bid an amount (stated as a percentage penalty) that they are willing to take from the delinquent taxpayer to clear the lien.⁷⁰ The winning bidder is the person offering the lowest penalty; he or she then has the right to purchase the lien by paying the back taxes.⁷¹ If the property owner does not redeem the property by paying off the lienholder within a statutory period, then the lienholder may obtain a tax deed for the property.⁷²

Because property purchased for back taxes can sometimes be resold at a significant profit, the auctions are fiercely competitive, often with multiple bidders willing to accept the lowest possible penalty—nothing (0%).⁷³ What happens, then, when multiple bidders offer the minimum? The county's solution was to implement a "rotation" system that—in theory—provided for a fair apportionment of liens amongst 0% bidders.⁷⁴ But avarice and gamesmanship converged to skew the results: bidders would not only participate in their own name, but they would also send agents as well, and thereby receive a disproportionate amount of the liens. To stymie those shenanigans, the county adopted a "Single, Simultaneous Bidder Rule," which (1) required each "tax buying entity" to submit bids in its own name and (2) prohibited it from using "agents, employees, or related entities" to submit simultaneous bids.⁷⁵ To give teeth to the rule, the county required each auction participant to sign an affidavit swearing that he or she was in compliance with the Rule.⁷⁶

The dispute arose because the defendants allegedly violated the Rule, offered fraudulent affidavits, and thereby received a disproportionate share of the liens at the expense of the plaintiffs and other bidders.⁷⁷ Based on these allegations, the district court dismissed the suit, holding that plaintiffs' injuries were too remote.⁷⁸ The United States Court of Appeals for the Seventh Circuit reversed, but it acknowledged a circuit split on the issue of whether "the direct *victim*

69. *Id.* at 642.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 643.

75. *Id.*

76. *Id.*

77. *Id.* at 643-44.

78. *Id.* at 645.

may recover through RICO whether or not it is the direct *recipient* of the false statements.”⁷⁹ The Supreme Court granted certiorari⁸⁰ to resolve an issue left open by *Anza*: namely, “whether first-party reliance is an element of a civil RICO claim predicated on mail fraud.”⁸¹

The Court in *Bridge* first examined the problem from a structural perspective, essentially setting out the grammar of a cognizable civil RICO claim: (1) standing to bring a civil claim under § 1964(c); (2) for violation of one of the substantive provisions of § 1962 (subsection “c” in this case); (3) through “racketeering activity,” which is defined in § 1961(1)(B) to include a host of so-called predicate acts (here, mail fraud under § 1341).⁸² Offered in plain English and tailored for the case at hand, “[t]he upshot is that RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise’s affairs through a pattern of acts indictable as mail fraud.”⁸³ According to the Court, “[o]nce the relationship among these statutory provisions is understood, respondents’ theory of the case is straightforward,” to wit:

They allege that petitioners devised a scheme to defraud when they agreed to submit false attestations of compliance with the Single, Simultaneous Bidder Rule to the county. In furtherance of this scheme, petitioners used the mail on numerous occasions to send the requisite notices to property owners. Each of these mailings was an “act which is indictable” as mail fraud, and together they constituted a “pattern of racketeering activity.” By conducting the affairs of their enterprise through this pattern of racketeering activity, petitioners violated § 1962(c). As a result, respondents lost the opportunity to acquire valuable liens. Accordingly, respondents were injured in their business or property by reason of petitioners’ violation of § 1962(c), and RICO’s plain terms give them a private right of action for treble damages.⁸⁴

Against this uncluttered liability scheme, defendants argued that (1) because mail fraud was the bottom brick in plaintiffs’ RICO wall, (2) the whole wall collapsed since plaintiffs could not show that they *relied* on anything fraudulent because the alleged misrepresentations—defendants’ affirmations of compliance with the Rule—were made to

79. *Id.* at 646; *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 932 (7th Cir. 2007).

80. *See* 552 U.S. 1087 (2008).

81. *Bridge*, 553 U.S. at 646.

82. *Id.* at 647.

83. *Id.*

84. *Id.* at 647-48.

the county, not plaintiffs.⁸⁵ In defendants' view, although the county may have relied on their misrepresentations, plaintiffs never received the misrepresentations and, as a consequence, could not show reliance.⁸⁶ Thus, defendants argued, plaintiffs failed to state a claim under RICO. The Court immediately focused on the underlying premise of defendants' position and set out to show it false.⁸⁷

1. Reliance Under *Bridge*

If civil RICO has a reliance requirement, then it must flow from one of two sources: the mail fraud statute or the civil standing provision of § 1964(c).⁸⁸ The first candidate was easily dispatched because the Court had recently and unequivocally held that “[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation.”⁸⁹ It is thus beyond serious dispute that:

no showing of reliance is required to establish that a person has violated § 1962(c) by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of mail fraud. If reliance is required, then, it must be by virtue of § 1964(c), which provides the right of action. But it is difficult to derive a first-party reliance requirement from § 1964(c), which states simply that “[a]ny person injured in his business or property by reason of a violation of section 1962” may sue for treble damages.⁹⁰

To hold otherwise, according to the Court, is to swim against the strong textual current of § 1964(c), which extends, without qualification, private rights to “[a]ny person injured” by a criminal RICO violation.⁹¹ This “breadth of coverage” squares neither with an implied reliance requirement nor the reality that a person can in fact be injured by a misrepresentation of which she was unaware:

85. *Id.* at 648.

86. *Id.*

87. *Id.* (“If petitioners’ proposed requirement of first-party reliance seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.”).

88. *Id.* at 649.

89. *Id.* at 648–49 (citing *Neder v. United States*, 527 U.S. 1, 24–25 (1999) (“The common-law requirement[] of ‘justifiable reliance’ . . . plainly ha[s] no place in the [mail, wire, or bank] fraud statutes.” (alterations in original))).

90. *Id.* at 649 (quoting 18 U.S.C. § 1964(c) (2006)).

91. *Id.*

This is a case in point. Accepting their allegations as true, respondents clearly were injured by petitioners' scheme: As a result of petitioners' fraud, respondents lost valuable liens they otherwise would have been awarded. And this is true even though they did not rely on petitioners' false attestations of compliance with the county's rules. Or, to take another example, suppose an enterprise that wants to get rid of rival businesses mails misrepresentations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business "by reason of" a pattern of mail fraud, even though they never received, and therefore never relied on, the fraudulent mailings. Yet petitioners concede that, on their reading of § 1964(c), the rival businesses would have no cause of action under RICO, even though they were the primary and intended victims of the scheme to defraud.⁹²

To combat this text-based position, defendants offered three common law and policy-based arguments. First, defendants asserted that "RICO should be read to incorporate a first-party reliance requirement in fraud cases under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses."⁹³ Defendants' two-part reasoning was that because common law fraud requires victim reliance, and because the Court had previously imported common law constructs into the RICO framework in *Beck v. Prupis*, the same should be done in the present case.⁹⁴ The flaw in this argument, according to the Court, is that *Beck* is only superficially analogous:

92. *Id.* at 649-50 (citation omitted). Justice Thomas's hypothetical is not far from reality. In 1995, Proctor & Gamble sued Amway under various causes of action, including RICO mail-fraud claims, for spreading rumors that the company and its president were active Satan-worshippers. *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 542-43 (5th Cir. 2001). The Fifth Circuit relied on a "narrow exception" from an earlier case suggesting that under RICO mail-fraud claims "defendants' competitors might recover for injuries to competitive position" even though the competitor, in this case, Proctor & Gamble, did not directly rely on the fraud. *Id.* at 565 (citing *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000)), *overruled by* *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)). The court ultimately found that Proctor & Gamble's RICO mail-fraud claim was sufficient because, "if P & G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation." *Id.*

93. *Bridge*, 553 U.S. at 650 (internal quotation marks omitted).

94. *Id.* at 650-62 (citing RESTATEMENT (SECOND) OF TORTS § 537 (1977) ("The recipient of a fraudulent misrepresentation may recover for common law fraud . . . if, but only if . . . he relies on the misrepresentation in acting or refraining from action." (internal quotation marks omitted)); *Beck v. Prupis*, 529 U.S. 494, 504 (2000) ("[W]hen Congress established in RICO a civil cause of action for a person 'injured . . . by reason of' a 'conspir[acy],' it meant to adopt these well-established common-law civil conspiracy principles.")).

The critical difference between *Beck* and this case is that in § 1962(d) Congress used a term—"conspir[acy]"—that had a settled common-law meaning, whereas Congress included no such term in § 1962(c). Section 1962(c) does not use the term "fraud"; nor does the operative language of § 1961(1)(B), which defines "racketeering activity" to include "any act which is indictable under . . . section 1341." And the indictable act under § 1341 is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud. In short, the key term in § 1962(c)—"racketeering activity"—is a *defined term*, and Congress defined the predicate act not as fraud *simpliciter*, but mail fraud—a statutory offense unknown to the common law. In these circumstances, the presumption that Congress intends to adopt the settled meaning of common-law terms has little pull.⁹⁵

Second, defendants argued that even if first-party reliance is not an element of a fraud-based criminal RICO claim, a civil plaintiff "must show that it relied on the defendant's misrepresentations in order to establish the requisite element of causation."⁹⁶ In support of their position, defendants pointed to certain common law principles, especially as embodied in section 548A of the Restatement (Second) of Torts, which provides, "A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance."⁹⁷

The Court deemed this argument "twice flawed."⁹⁸ As a threshold matter, the Court pointed back to its determination that mail fraud, not common law fraud, was the predicate act at issue:

Having rejected petitioners' argument that reliance is an element of a civil RICO claim based on mail fraud, we see no reason to let that argument in through the back door by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of a common-law fraud claim.⁹⁹

95. *Bridge*, 553 U.S. at 653 (alteration in original). The Court also noted:

Beck relied not only on the fact that the term "conspiracy" had a settled common-law meaning, but also on the well-established common-law understanding of what it means to be injured by a conspiracy for purposes of bringing a civil claim for damages. No comparable understanding exists with respect to injury caused by an enterprise conducting its affairs through a pattern of acts indictable as mail fraud.

Id. at 653 (citation omitted).

96. *Id.*

97. *Id.* at 655 (internal quotation marks omitted).

98. *Id.*

99. *Id.*

Even more to the point, however, defendants' flat-footed position that absent proof of victim reliance an injured plaintiff cannot recover is simply wrong because "there is no general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it."¹⁰⁰ The Restatement does not go so far; to the contrary, it and much case law hold otherwise.¹⁰¹ For example, "the Restatement specifically recognizes 'a cause of action' in favor of the injured party where the defendant 'defrauds another for the purpose of causing pecuniary harm to a third person.'"¹⁰²

In sum, given the facts of the case, the Court concluded that its view of the matter was in harmony with its previous causation pronouncements and, moreover, that the plaintiffs were ideally situated to enforce RICO's prohibitions:

Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens. And here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue.¹⁰³

In an important qualification, the Court went on to state, "Of course, none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations."¹⁰⁴ Thus, "[i]n most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation."¹⁰⁵ As an

100. *Id.* at 656.

101. RESTATEMENT (SECOND) OF TORTS § 548A (1977), upon which defendants' argument relied, ironically enough, requires only that *someone* rely on a misrepresentation and that injury be foreseeable. *Bridge*, 553 U.S. at 656-57 n.7 (citing cases upholding this principle).

102. *Bridge*, 553 U.S. at 657 (quoting RESTATEMENT (SECOND) OF TORTS § 435A cmt. a (1965)).

103. *Id.* at 658.

104. *Id.*

105. *Id.*; see also Brief for National Association of Shareholder and Consumer Attorneys as Amicus Curiae Supporting Respondents, 553 U.S. 639 (2008) (No. 07-210), 2008 WL 782548, at *7 ("Reliance (or its absence) may in some situations establish (or not establish) the proximate cause nexus between a violation of RICO and the injury to the victim's business or property, but it is plainly not necessary in every situation . . ." (emphasis omitted) (citing Gordon, *Rethinking Civil RICO*, *supra* note 5)); Gordon, *Rethinking Civil RICO*, *supra* note 5, at 329 ("In most cases, causation and reliance amount to the same thing.").

affirmative matter of pleading and proof, then, “it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation.”¹⁰⁶

So, at bottom, reliance remains a useful concept in fraud-based civil RICO claims. It is not an element of the claim,¹⁰⁷ but it is a handy way to test causal chains, particularly if reliance appears far down the chain from the person claiming injury.¹⁰⁸ And the total absence of reliance from a case surely means that there was no fraud at all.¹⁰⁹

In a final stab at § 1964’s heart, defendants suggested that a first-party reliance requirement is a practical way to halt the “‘over-federalization’ of traditional state-law claims.”¹¹⁰ In support of this policy argument, they repeated the standard argument that such a limitation is necessary “to prevent garden-variety disputes between local competitors (such as this case) from being converted into federal racketeering actions.”¹¹¹ None of this fell on fertile soil: “Whatever the merits of petitioners’ arguments as a policy matter, we are not at liberty

106. *Bridge*, 553 U.S. at 659.

107. *See, e.g.*, *Biggs v. Eaglewood Mortg., LLC*, 353 F. App’x 864, 866-67 (4th Cir. 2009) (finding that *Bridge* “eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud”); *Brown v. Cassens Transp. Co.*, 546 F.3d 347, 357 (6th Cir. 2008) (“After *Bridge*, plaintiffs need not plead or prove that they relied on defendants’ alleged misrepresentations in order to establish the elements of their civil RICO claim based on mail or wire fraud.”); *Grange Mut. Cas. Co. v. Mack*, 290 F. App’x 832, 832-33, 835-36 (6th Cir. 2008) (remanding plaintiff’s RICO claims for further inquiry into proximate cause in accordance with *Bridge*’s removal of the requirement of third-party reliance).

108. *See, e.g.*, *Chaz Concrete Co. v. Codell*, No. 3:03-52-KKC, 2010 WL 1227750, at *14 (E.D. Ky. Mar. 29, 2010) (dismissing plaintiffs’ third-party RICO claims because, even though *Bridge* does not require plaintiffs to “argue their injuries were caused by their reliance on the Defendants’ false statements, if the Plaintiffs do make such an argument, [as they did,] then they must submit evidence of what those statements were and of their falsity [as they failed to do]”). *Compare* *Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP*, 585 F. Supp. 2d 1339, 1343-45 (M.D. Fla. 2008) (finding that even though plaintiffs’ alleged third-party reliance by physicians who prescribed a drug marketed and promoted to them by the manufacturer, their claims failed under the proximate causation requirement), *with Brown*, 546 F.3d at 351, 357 (finding that “plaintiffs have sufficiently pleaded a pattern of racketeering activity given that reliance is not an element of a civil RICO fraud claim”), *and Johnson v. KB Home*, No. CV-09-00972-PHX-FJM, 2010 WL 1268144, at *6 (D. Ariz. Mar. 30, 2010) (“Because *Bridge* does not require plaintiffs to plead reliance and [defendant] does not offer a cogent argument for why they must otherwise do so to show causation under the circumstances of this case, we deny [defendant’s] motion to dismiss with respect to causation.”).

109. *See Bridge*, 553 U.S. at 657-61; *see also Ironworkers*, 585 F. Supp. 2d at 1343 (recognizing that “the complete absence of reliance may prevent the plaintiff from establishing proximate cause” (quoting *Bridge*, 553 U.S. at 658-59)).

110. *Bridge*, 553 U.S. at 659.

111. *Id.* at 660 (internal quotation marks omitted).

to rewrite RICO to reflect their—or our—views of good policy.”¹¹² And if the fact that “RICO’s text provides no basis for imposing a first-party reliance requirement . . . leads to the undue proliferation of RICO suits, the ‘correction must lie with Congress.’”¹¹³

2. (Over)Applying Reliance Under *Bridge*

If *Anza* led to overcorrections in one direction, then *Bridge* did so in the other. For instance, the United States Court of Appeals for the Fifth Circuit fairly quickly held that “to the extent that our prior cases are in conflict with *Bridge*, they are overruled.”¹¹⁴ That statement, in isolation, is innocuous and legally demanded. But the court made this proclamation in the context of a case in which the district court had supposedly dismissed the complaint based on “Fifth Circuit precedent that is no longer good law.”¹¹⁵ The precedent specifically mentioned is *Summit Properties Inc. v. Hoechst Celanese Corp.*¹¹⁶ *Summit* was a products liability case in which the plaintiffs alleged that polybutylene plumbing systems installed on their properties were defective.¹¹⁷ Their RICO fraud claim turned on the allegation that the defendants made fraudulent statements concerning suitability, quality, and reliability in connection with the marketing of these systems.¹¹⁸ The property-owner plaintiffs did not receive or rely on the alleged misrepresentations.¹¹⁹ The court noted that most circuits at the time required “a showing of detrimental reliance by the plaintiff, which is consistent with *Holmes*’ admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff’s injuries and the underlying RICO violation.”¹²⁰ And, as the court went on to explain, that makes especially good sense in the context of products liability claims:

The rationale for requiring reliance in cases such as this one becomes clear in the light cast by the distinction between causation as an element of a claim for fraud and producing cause as an element of a claim for products liability. The linkage between design defect and injury is

112. *Id.*

113. *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

114. *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009).

115. *Id.*

116. 214 F.3d 556 (5th Cir. 2000).

117. *Id.* at 558.

118. *Id.*

119. *See id.*

120. *Id.* at 560 (footnote omitted).

between the *defect* and the injury. With a claim for fraud, however, the linkage is between the defendants' *fraud* and the injury.¹²¹

This is so because “[a]s a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not.”¹²² Consequently, “[t]he causal connection between a misrepresentation and a subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision.”¹²³ But the court was not making this assessment solely in terms of first-party reliance. Rather, it was merely registering that reliance is *one way* of showing causation, not the only way. That is, the plaintiff must show that it “has *either* been the target of a fraud *or* has relied upon the fraudulent conduct of the defendants.”¹²⁴ The court thus allowed that “[i]n the current case, for example, the defendants’ competitors might recover for injuries to competitive position,” even though they had not relied on the fraud.¹²⁵

It is not clear that this reasoning should not survive *Bridge*. In fact, one could argue that the Supreme Court—indirectly, at least—endorsed *Summit*’s holding,¹²⁶ given that it appeared to approve of the reasoning of *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, whose own reasoning is based on *Summit*.¹²⁷ In any event, to the extent that *Bridge* was read to roll back the central holding of *Anza*, the Supreme Court’s most recent foray into the causation thicket should disabuse us of that notion.

D. *Revisiting Causation and Third-Party Reliance: Hemi*

In *Hemi Group, LLC v. City of New York*, the Court was called upon to revisit the issue of causation in the context of misrepresentations made to someone other than the plaintiff.¹²⁸ The Court succinctly stated the facts as follows:

121. *Id.* (footnote omitted).

122. *Id.*

123. *Id.*

124. *Id.* at 561 (emphasis added).

125. *Id.*

126. See *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 646 (2008) (recognizing that *Sandwich Chef* acknowledged “‘a narrow exception to the requirement that the plaintiff prove direct reliance on the defendant’s fraudulent predicate act . . . when the plaintiff can demonstrate injury as a direct and contemporaneous result of a fraud committed against a third party’” (alteration in original) (quoting *Sandwich Chef of Tex., Inc. v. Reliance Nat’l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003))).

127. 319 F.3d at 218-25.

128. 130 S. Ct. 983 (2010).

The City of New York taxes the possession of cigarettes. Hemi Group, based in New Mexico, sells cigarettes online to residents of the City. Neither state nor city law requires Hemi to charge, collect, or remit the tax, and the purchasers seldom pay it on their own. Federal law, however, requires out-of-state vendors such as Hemi to submit customer information to the States into which they ship the cigarettes. Against that backdrop, the City filed this lawsuit under [RICO], alleging that Hemi failed to file the required customer information with the State. That failure, the City argues, constitutes mail and wire fraud, which caused it to lose tens of millions of dollars in unrecovered cigarette taxes.¹²⁹

To state the facts in this way is to lay out a long causal chain. To wit: Hemi sold cigarettes to residents of New York City and did not fulfill its legal obligation to submit purchasers' names to the State. Without the reports, the State could not fulfill its contractual obligation to pass along the names to the City and without the names from the State, the City could not determine which customers had not paid taxes. And without that information, the City could not pursue the nonpaying customers; therefore, the City was injured in the amount of the unpaid taxes.¹³⁰

Thus stated, the theory of causation fits comfortably into the *Anza* framework, especially given that "the conduct directly responsible for the City's harm was the customers' failure to pay their taxes" and that "the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act reports."¹³¹ In other words, as in *Anza*, there was a gap between the direct harm-producing conduct and fraud-producing conduct.¹³² Even more troubling for the Court, "the City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*."¹³³ The Court thus declined to "extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to

129. *Id.* at 986.

130. *See id.*

131. *Id.* at 990. The Jenkins Act "requires out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents." *Id.* at 987 (citing 15 U.S.C. §§ 375-378, *repealed by* Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (2010)).

132. *Id.* at 990. In his dissent, Justice Breyer opined that *Hemi* is not like *Anza* because "the *kind of harm* that the plaintiff alleged [in *Anza*] is not the *kind of harm* that the tax statutes [in *Hemi*] primarily seek to prevent." *Id.* at 999-1000. Rather, the plaintiffs in *Hemi* "alleged a kind of harm (competitive injury) that tax violations do not ordinarily cause and which ordinarily flows from the regular operation of a competitive marketplace." *Id.* at 1000.

133. *Id.* at 990.

cause harm to the plaintiff (the City)."¹³⁴ This is particularly so because harm accrues only if the fourth-party taxpayers made the predicate decision not to pay the taxes that they had a legal obligation to pay.¹³⁵ And even if that harm was foreseeable, that is not enough: proximate cause depends on "directness" not "foreseeability."¹³⁶

The City offered a number of rebuttal points, one of which is likely to have larger consequences. Specifically, the City argued that the violation it claimed was not merely that Hemi did not file Jenkins Act reports; rather, Hemi had concocted a "systematic scheme to defraud the City of tax revenue."¹³⁷ But, according to the Court, to embrace such a theory would be to reduce its precedents "to a mere pleading rule."¹³⁸ For example, in *Anza*, the plaintiff could not "circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense."¹³⁹ Even more to the point, the Court has more than once held that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'"¹⁴⁰ But the only fraudulent conduct that the City alleged was a Jenkins Act violation. Thus the City had to show "that Hemi's failure to file the Jenkins Act reports with the State led directly to its injuries," which it could not do.¹⁴¹ Given this strict articulation of the causation rule, it remains to be seen whether many (or any) "scheme to defraud" claims will survive motions to dismiss, absent pleading that a *misrepresentation* is the direct cause of injury.¹⁴²

134. *Id.* at 985.

135. *Id.* at 990. In its arguments to the Court, the City changed course and alleged that Hemi made misrepresentations to City residents that encouraged them not to pay taxes. *Id.* at 993. The Court declined to consider these allegations because the City had earlier disavowed them. *Id.* at 994.

136. *Id.* at 991.

137. *Id.*

138. *Id.*

139. *Id.* (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006)).

140. *Id.* (citing *Anza*, 547 U.S. at 457 (alterations in original)).

141. *Id.* at 992.

142. *Compare Chaz Concrete Co. v. Codell*, No. 3:03-52-KKC, 2010 WL 1227750, at *10-11 (E.D. Ky. Mar. 29, 2010) ("[T]he Plaintiffs cannot meet their burden of showing that the Defendants' fraud caused the Plaintiffs' injuries by simply showing that 'the concept of the injury was well known to the defendants' and, thus, foreseeable Instead, the Plaintiffs must produce evidence of a direct relationship between their injuries and the fraud."), with *Johnson v. KB Home*, No. CV-09-00972-PHX-FJM, 2010 WL 1268144, at *6 (D. Ariz. Mar. 30, 2010) (reversing dismissal of plaintiffs complaint because even though plaintiffs' did not plead reliance, they sufficiently pleaded that defendants' actions were "a direct cause of their injuries and a substantial factor in the sequence of responsible causation" (internal quotation marks omitted)).

The City also tried to wrap itself in *Bridge*.¹⁴³ But the Court again noted that the theory of causation there was “straightforward”: Because of the zero-sum nature of the auction, and because the county awarded bids on a rotational basis, each time a fraud-induced bid was awarded, a particular legitimate bidder was necessarily passed over.”¹⁴⁴ Even more important, the losing bidders “‘were the *only* parties injured by petitioners’ misrepresentations.’ The county was not; it received the same revenue regardless of which bidder prevailed.”¹⁴⁵ In contrast, the Court opined, the City’s theory was anything but “straightforward,” given that “[m]ultiple steps . . . separate the alleged fraud from the asserted injury.”¹⁴⁶ And unlike *Bridge*, where there were “‘no independent factors that account[ed] for [the plaintiff’s] injury,’ here there certainly were: The City’s theory of liability rests on the independent actions of third and even fourth parties.”¹⁴⁷ Again, this line of argument is bound to impact cases in which plaintiffs—as a theory of causation—substitute allegations of a “scheme to defraud” directed at the plaintiffs for predicate acts that are actually felt elsewhere.¹⁴⁸

In sum, *Hemi* may fairly be read to hold that civil RICO causation cannot be premised on a theory depending on an allegation that fraud perpetrated on a third party prevented that party from taking actions that could have prevented the plaintiff’s injury.

IV. RELAXING THE RICO “ENTERPRISE” ELEMENT UNDER *BOYLE*

Boyle presents a version of the familiar aphorism that “hard cases make bad law,” something like: Cases in weird procedural postures lead to decisions that are hard to apply to other situations.¹⁴⁹ The case arrived at the Supreme Court framed as a disagreement over the adequacy of a jury instruction given in a criminal RICO trial.¹⁵⁰ The

143. *Hemi*, 130 S. Ct. at 992.

144. *Id.*

145. *Id.* (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008) (citation omitted)).

146. *Id.*

147. *Id.* (alterations in original) (citation omitted).

148. *E.g.*, *Chaz Concrete Co. v. Codell*, No. 3:03-52-KKC, 2010 WL 1227750, at *10-11 (E.D. Ky. Mar. 29, 2010) (describing plaintiff’s claims of reliance and injury from defendants’ misrepresentations to a state agency allowing defendants’ to obtain federally funded transportation projects).

149. This phrase originates from Justice Oliver Wendell Holmes. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). The full quotation actually reads: “Great cases like hard cases make bad law.” *Id.*

150. *Boyle v. United States*, 129 S. Ct. 2237, 2241-42 (2009).

instruction at issue purported to set forth the standards for establishing the “enterprise” element of a RICO claim through an “association-in-fact.”¹⁵¹ For purposes of deciding the case, the Court stated the question presented as “whether an association-in-fact enterprise . . . must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.”¹⁵² For an answer, the Court offered the oracular statement that “such an enterprise must have a ‘structure’ but that an instruction framed in this precise language is not necessary.”¹⁵³ What is necessary remains to be seen, but the Court’s reasoning leading up to the holding perhaps sheds some light.

But first, some general background will help. RICO’s principal target is traditional organized crime.¹⁵⁴ And although its reach is much broader, we can see that it was drafted with the sorts of things that old school organized criminals (e.g., the Mafia) did: infiltrating unions and their pension funds, investing in and skimming profits from casinos, muscling in on trash collection companies, and actually

151. *Id.* at 2242. The jury instruction read:

The term “enterprise” as used in these instructions may also include a group of people associated in fact, even though this association is not recognized as a legal entity. Indeed, an enterprise need not have a name. Thus, an enterprise need not be a form[al] business entity such as a corporation, but may be merely an informal association of individuals. A group or association of people can be an “enterprise” if, among other requirements, these individuals “associate” together for a purpose of engaging in a course of conduct. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.

Moreover, you may find an enterprise where an association of individuals, *without structural hierarchy*, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and . . . by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.

Regarding “organization,” *it is not necessary that the enterprise have any particular or formal structure*, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise.

Id. at 2242 n.1.

152. *Id.* at 2241 (internal quotation marks omitted).

153. *Id.*

154. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970) (“It is the purpose of this Act to seek the eradication of organized crime in the United States . . .”); see also *Beck v. Prupis*, 529 U.S. 494, 496 (2000) (discussing the purpose of RICO).

committing crimes like distributing drugs or running prostitution rings.¹⁵⁵ Consequently, the drafters built the statute around the concept of an “enterprise,” which could be a traditional corporation or union, or a criminal organization itself.¹⁵⁶ To capture the latter concept, the statute provides for an “association-in-fact” enterprise, which could mean something like an ordinary “conspiracy,” or something more complicated like the Mafia.¹⁵⁷ Most lower courts thought that it meant the latter and developed standards for identifying true “associations”—i.e., gangs that shared at least something of the Mafia’s structure of dons, capos, wiseguys, etc.¹⁵⁸ Accordingly, many courts held that an association-in-fact enterprise must:

- Have an existence separate and apart from the pattern of racketeering;
- Be an ongoing organization;
- Function as a continuing unit as shown by a hierarchical or consensual decision making structure.¹⁵⁹

It is against this backdrop that *Boyle* must be understood.

A. *The Court’s Analysis in Boyle*

Boyle himself participated in a series of bank thefts engineered by a core group, along with others recruited for particular jobs. The

155. See 18 U.S.C. § 1961(1) (2006) (defining “racketeering activity” to include “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance” as well as many other activities); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. at 923 (“[M]oney obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation [is] used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic process . . .”).

156. See 18 U.S.C. § 1961(4) (“‘[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . .”); *id.* § 1962 (detailing prohibited activities).

157. *Id.* § 1961(4) (“[E]nterprise includes . . . any union or group of individuals associated in fact although not a legal entity.” (emphasis added)).

158. See, e.g., *United States v. Irizarry*, 341 F.3d 273, 286 (3d Cir. 2003) (finding that an enterprise requires “an ongoing organization with some sort of framework” that must “be separate and apart from the pattern of activity”); *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987) (finding that an enterprise requires “some continuity of structure and of personnel” and “an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity”). But see, e.g., *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000) (finding that an enterprise is “an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes”).

159. *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995); see also *Landry v. Air Line Pilots Ass’n Int’l AFL-CIO*, 901 F.2d 404, 433 (5th Cir. 1990).

group was only “loosely and informally” organized, and had no obvious leader or hierarchy.¹⁶⁰ Boyle was indicted for, among other things, two RICO violations: illegally participating in the conduct of an enterprise under § 1962(c) and conspiring to do so under § 1962(d).¹⁶¹ At trial, Boyle objected to the court’s “enterprise” instruction, and requested that the jury be told that “the Government was required to prove that the enterprise had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.”¹⁶² The district court declined that invitation, and Boyle was convicted of the RICO violations.¹⁶³

The Court first approached the “enterprise” question textually, noting that the statutory definition includes both traditional business organizations, as well as “any . . . group of individuals associated in fact,” with “[t]he term ‘any’ ensur[ing] that the definition has a wide reach.”¹⁶⁴ The Court next turned to its seminal enterprise case, *United States v. Turkette*,¹⁶⁵ in which it held that “an enterprise includes any union or group of individuals associated in fact,” that RICO extends to “a group of persons associated together for a common purpose of engaging in a course of conduct,” and that a RICO enterprise “is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”¹⁶⁶

The Court opined that the question before it, namely, “whether an association-in-fact enterprise must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages,”¹⁶⁷ required three separate inquiries:

- First, must an association-in-fact enterprise have a “structure”?
- Second, must the structure be “ascertainable”?
- Third, must the “structure” go “beyond that inherent in the pattern of racketeering activity” in which its members engage?¹⁶⁸

The Court agreed that an association-in-fact must have a structure.¹⁶⁹ But to define that structure, the Court simply turned to an

160. Boyle v. United States, 129 S. Ct. 2237, 2241 (2009).

161. *Id.* at 2241-42.

162. *Id.* at 2242 (internal quotation marks omitted).

163. *Id.*

164. *Id.* at 2243 (emphasis added).

165. 452 U.S. 576 (1981).

166. Boyle, 129 S. Ct. at 2243 (quoting *Turkette*, 452 U.S. at 580, 583).

167. *Id.* at 2240 (internal quotation marks omitted).

168. *Id.*

ordinary dictionary and picked a generic definition: “In the sense relevant here, the term ‘structure’ means ‘[t]he way in which parts are arranged or put together to form a whole’ and ‘[t]he interrelation or arrangement of parts in a complex entity.’”¹⁷⁰ Against this standard, an association-in-fact enterprise must have at least three features: “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”¹⁷¹

The Court made relatively short work of the “ascertainable” issue, given the criminal posture of the case: “Whenever a jury is told that it must find the existence of an element beyond a reasonable doubt, that element must be ‘ascertainable’ or else the jury could not find that it was proved.”¹⁷²

The greatest repercussions of the case no doubt will be felt in the “[b]eyond that inherent in the pattern of racketeering activity” issue.¹⁷³ The Court suggested:

This phrase may be interpreted in [at] least two different ways, and its correctness depends on the particular sense in which the phrase is used. If the phrase is interpreted to mean that the existence of an enterprise is a separate element that must be proved, it is of course correct.

....

On the other hand, if the phrase is used to mean that the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity, it is incorrect.¹⁷⁴

With one stroke, the Court eviscerated the holdings of scores of cases in which lower courts had held that there must be a sharp distinction between the alleged associational enterprise and the predicate acts.¹⁷⁵ Among other things, the Court may have undermined

169. *Id.*

170. *Id.* at 2244 (alterations in original) (quoting AMERICAN HERITAGE DICTIONARY 1718 (4th ed. 2000)).

171. *Id.*

172. *Id.*

173. *Id.* at 2245.

174. *Id.*

175. *E.g.*, *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 804-05 (7th Cir. 2008) (holding that plaintiffs failed to allege an enterprise where no structure was identified in the complaint because “[w]ithout a requirement of structure, ‘enterprise’ collapses to ‘conspiracy’”); *Walker v. Jackson Pub. Sch.*, 42 F. App’x 735, 737-38 (6th Cir. 2002) (affirming district court’s dismissal because there was no evidence of chain of command or hierarchy); *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 699 (6th Cir. 2000), *abrogated on other grounds by* *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (stating that plaintiff must show formal or informal association as part of a

many cases holding that a mere “conspiracy” is not the same as an association-in-fact enterprise.¹⁷⁶ Nonetheless, there are still good reasons, even within *Boyle*, to believe that an ordinary civil conspiracy should not qualify for treatment as an enterprise.¹⁷⁷ After all, Boyle ran a gang of bank robbers. This fits comfortably within even a lay view of a criminal enterprise. But that is not what one typically sees in a civil RICO case.¹⁷⁸ There, more often than not, the alleged association-in-fact is a group of corporations (or corporations and individuals)—not a “gang.”¹⁷⁹ We must also remember that the *Boyle* Court plainly found that the “beyond a reasonable doubt” standard of proof assured that true criminal enterprises would be sieved from nonenterprises.¹⁸⁰

B. *Figuring Out What To Do with Boyle*

In the wake of *Boyle*, there are a number of evaluative tools that can serve as surrogates for the criminal law’s heightened proof standards when examining alleged enterprises in the civil context. In undertaking such an analysis, it bears repeating that the type of

continuing unit separate and apart from the commission of racketeering activity); *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 815-16 (8th Cir. 1992) (stating that plaintiff “failed to allege an enterprise distinct from the alleged pattern of racketeering activity” because “[t]he only common factor that linked all these parties together and defined them as a distinct group was their direct or indirect participation in [the defendant’s] scheme to defraud [the plaintiff]”); *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989) (“An enterprise must be an entity separate and apart from the pattern in which it engages.” (internal quotation marks omitted)). But see *Odom v. Microsoft Corp.*, 486 F.3d 541, 550-51 (9th Cir. 2007) (noting the circuit split and finding that an associated-in-fact enterprise “does not require any particular organizational structure, separate or otherwise”).

176. See *Boyle*, 129 S. Ct. at 2246 (“Finally, while in practice the elements of a violation of §§ 1962(c) and (d) are similar, this overlap would persist even if petitioner’s conception of an association-in-fact enterprise were accepted.”); *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (stating that a mere conspiracy to commit racketeering is not sufficient to establish an association-in-fact enterprise, rather some formal or informal organizational structure apart from the alleged conspiracy to defraud is required).

177. See, e.g., *Bachman*, 178 F.3d at 932 (“That is a conspiracy, but it is not an enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies.”); see also *Boyle*, 129 S. Ct. at 2246 (“Section 1962(c) demands much more [than proof of an ordinary conspiracy]: the creation of an ‘enterprise’—a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses.”).

178. See sources cited *supra* note 11.

179. E.g., *Bingham v. Zolt*, 683 F. Supp. 965, 967 (S.D.N.Y. 1988) (stating that corporations and law firms may be RICO enterprises); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1364 (D. Conn. 1987) (describing group of corporations, organizations, and other individuals promoting fraudulent securities); *In re Gas Reclamation, Inc. Sec. Litig.*, 659 F. Supp. 493, 499 (S.D.N.Y. 1987) (describing a group of corporations and individuals packing and selling gas reclamation units to the public).

180. *Boyle*, 129 S. Ct. at 2244.

association-in-fact proven in *Boyle* is unlike that usually alleged in civil litigation.¹⁸¹ The differences between a *Boyle*-like association and a civil-RICO association are often striking, and plenty of well-reasoned case law is available to show why many alleged civil associations should not be sustainable, even after *Boyle*.¹⁸² A few possible ways of looking at these associations post-*Boyle* are worth exploring.

1. Redefining Pleading Standards Under *Twombly*

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court abrogated its statement in *Conley v. Gibson*¹⁸³ that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁸⁴ To withstand a Rule 12(b)(6) motion after *Twombly*, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”¹⁸⁵

2. Cementing *Twombly*: *Iqbal*

In *Ashcroft v. Iqbal*, the Supreme Court elaborated on the pleading standards discussed in *Twombly*.¹⁸⁶ The Court set out a procedure for evaluating whether a complaint should be dismissed:

[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by

181. Specifically, *Boyle* involved a core group of bank robbers and other sporadic participants who targeted bank night-deposit boxes in several states over a ten-year period. *Id.* at 2241. The participants met and planned the act beforehand, but apparently had no leader or hierarchy and did not formulate any master plan. *Id.*

182. See, e.g., *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 399-400 (7th Cir. 2009) (affirming dismissal of § 1964(d) claim that contained “boilerplate allegations” and finding no association-in-fact enterprise for lack of a showing a common purpose when different actors were involved in each event); *Kaye v. D’Amato*, 357 F. App’x 706, 715 (7th Cir. 2009) (dismissing enterprise existing of city planning commission and other redevelopment authorities for lack of continuity); see also Hervé Gouraige, *Defining Civil Rico “Enterprise” After Boyle* *High Court Has Given Defense Counsel New Material*, N.Y. L.J., Sept. 8, 2009, at S8.

183. 355 U.S. 41, 45-46 (1957).

184. 550 U.S. 544, 562-63 (2007) (quoting *Conley*, 355 U.S. at 45-46) (“[*Conley*’s] ‘no set of facts’ language . . . is best forgotten as an incomplete, negative gloss on an accepted pleading standard . . .”).

185. *Id.* at 570; see also *Elsensohn v. St. Tammany Parish Sheriff’s Office*, 530 F.3d 368, 372 (5th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

186. 129 S. Ct. 1937 (2009).

factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.¹⁸⁷

This procedure requires a court to engage in a two-step analysis. First, a court should identify which statements in the complaint are factual allegations and which are legal conclusions.¹⁸⁸ “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”¹⁸⁹ Second, a court must assume the truth of all factual allegations, and determine whether those factual allegations allege a plausible claim.¹⁹⁰

With respect to the “plausibility” standard described in *Twombly*, *Iqbal* explained, “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹⁹¹ The *Iqbal* Court noted, “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”¹⁹² Perhaps the most important consequence here is that “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”¹⁹³ Stated differently, if a plaintiff fails to state a plausible theory of recovery, then—especially in a complicated case—he will not be allowed to engage the expensive machinery of litigation (i.e., discovery).

C. What This Means for Civil RICO Claims

As I have already discussed, the concept of “enterprise” is the *sine qua non* of any RICO claim, and the characteristic that

187. *Id.* at 1950.

188. *See id.*

189. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555). The *Iqbal* Court further explained: “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Id.* at 1950.

190. *Id.* at 1949 (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” (citation omitted) (quoting FED. R. CIV. P. 8(a)(2))).

191. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556).

192. *Id.*

193. *Id.* (quoting *Twombly*, 550 U.S. at 557).

distinguishes a RICO claim from an ordinary tort claim.¹⁹⁴ Consequently, a failure to allege an enterprise disables a claim under *any* RICO theory.¹⁹⁵ Not surprisingly, courts routinely apply the rigorous *Twombly/Iqbal* pleading standards to RICO generally, and to the enterprise element specifically.¹⁹⁶

Even though *Boyle* relaxed the standard for proving an association-in-fact enterprise, such an enterprise must still be established as a separate RICO element *and* must meet two criteria:

- It must be “an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives”; and
- “[T]he various members and associates of the association function[] as a continuing unit to achieve a common purpose.”¹⁹⁷

194. See *Bonner v. Henderson*, 147 F.3d 457, 459 (5th Cir. 1998) (“By the very language of the statute, the existence of an enterprise is an essential element of a RICO claim.”); *Chang v. Chen*, 80 F.3d 1293, 1298-99 (9th Cir. 1996), *overruled by* *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (noting that because the focus of RICO is on “organized” crime, an “organizational nexus” must be found at the heart of a scheme actionable under RICO); see also Gordon, *Crimes That Count Twice*, *supra* note 5; discussion *supra* Part IV.A.

195. E.g., *Brunig v. Clark*, 560 F.3d 292, 297 (5th Cir. 2009) (“In order to state a claim under RICO, a plaintiff must allege, among other elements, the existence of an enterprise.”); *In re Burzynski*, 989 F.2d 733, 741 (5th Cir. 1993) (“Thus, RICO claims under all four subsections necessitate . . . an *enterprise*” (internal quotation marks omitted)); *Reynolds v. E. Dyer Dev. Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989) (“[I]t is essential to plead precisely in a RICO case the enterprise alleged and the RICO section allegedly violated.”).

196. E.g., *Smartix Int’l Corp. v. MasterCard Int’l LLC*, 355 F. App’x 464, 466 (2d Cir. 2009) (“To survive a motion to dismiss, a plaintiff must sufficiently plead [the required elements for a § 1962(c) violation] to meet the standards set forth in *Twombly* and *Iqbal*.”); *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 09-11529, 2010 WL 931864, at *22-25 (E.D. Mich. Mar. 11, 2010) (“Although Plaintiffs allege a number of different possible enterprises, they have not arguably alleged one plausible enterprise.”); see also *Gross v. Waywell*, 628 F. Supp. 2d 475, 494-95 (S.D.N.Y. 2009) (“Plaintiffs’ reliance on ‘mail and/or wire fraud’ as the predicate offenses, by operation of *Twombly*’s plausibility test and the particularity requirement of Federal Rule of Civil Procedure 9(b) . . . demands greater specificity in the pleadings. Such particularity would require more details regarding the alleged predicate acts in which each particular defendant was directly or indirectly involved or had responsibility, as well as information concerning where, when and by which defendant any representations involved in the alleged fraudulent scheme constituting deception of Plaintiffs were communicated by use of the mail and/or wires, and how such statements actually deceived Plaintiffs.”). The court in *Gross* also analyzed 145 reported decisions of civil RICO claims from 2004 to 2007 and found that of the 36 cases resolved on the merits, 30 were dismissed under Rule 12(b)(6), three by the court *sua sponte*, and three under Rule 56; all decisions appealed to the Second Circuit were affirmed. 628 F. Supp. 2d at 480.

197. *Boyle v. United States*, 129 S. Ct. 2237, 2242 (2009) (quoting the district court’s jury instructions it affirmed); *Kaye v. D’Amato*, 357 F. App’x 706, 711 (7th Cir. 2009) (quoting these elements from *Boyle*); see also *McNulty v. Reddy Ice Holdings, Inc.*, No. 08-CV-13178, 2009 WL 2168231, at *3 (E.D. Mich. July 17, 2009) (“While [*Boyle*] does not represent a watershed change in controlling law, it does constitute a [sic] important

Thus a complaint that does no more than list a number of individuals and entities and slap the labels “association-in-fact” and “enterprise” on them should fail as a matter of *pleading* because “[t]his is a conclusory statement, a recitation of the elements masquerading as facts. It does not make it any more or less probable that the listed parties have an existence separate and apart from the pattern of racketeering, are an ongoing organization, and function as a continuing unit”¹⁹⁸

Boyle also leaves intact the rule that § 1962(c)—which, again, is the most commonly alleged RICO violation—imposes an obligation to plead a plausible distinction between the “person” (the defendants) and the “enterprise.”¹⁹⁹ That is, “to state a violation of subsection (c), the alleged RICO person and the alleged RICO enterprise must be distinct.”²⁰⁰ Further, a corporation cannot ordinarily be named as a defendant and as part of an association-in-fact enterprise.²⁰¹ In practice, this prevents a plaintiff from alleging a complete identity between the alleged “conspirators” and the enterprise and between the named defendants and the enterprise²⁰² because it contravenes the

clarification of the standards for establishing a RICO enterprise originally set forth in [*Turkette*].”).

198. *Clark*, 560 F.3d at 297; *see also* *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 804 (7th Cir. 2008) (applying *Twombly* to RICO claim and finding that “[n]owhere in the complaint does one find anything to indicate a structure of any kind”); *Duran v. Equifirst Corp.*, No. 2:09-cv-03856, 2010 WL 936199, at *4-5 (D.N.J. Mar. 12, 2010) (dismissing plaintiffs’ state-RICO claim because “[e]ach alleged predicate act is generally alleged to have been committed by every Defendant in this action, as opposed to alleging which particular Defendant . . . committed which particular predicate act,” and “[i]t is not explained how [the defendant] is tied to any of the predicate acts”).

199. *E.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) (“[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”); *see also Clark*, 560 F.3d at 297 (asserting an association of defendants is insufficient under *Twombly*).

200. *Andrews v. Am. Nat’l Red Cross, Inc.*, 176 F. Supp. 2d 673, 687 (W.D. Tex. 2001) (“Quite simply, a RICO person cannot employ or associate with itself.”).

201. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 447 (5th Cir. 2000); *Andrews*, 176 F. Supp. 2d at 687. Although it is a minority position, some cases hold that a corporation cannot be part of an association-in-fact *at all*. *See, e.g.*, *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1364-65 (M.D. Fla. 2005). The reasoning here is that “individual” in RICO’s definition of “enterprise” refers only to living persons.

202. Vaguely asserting that only “some” of the defendants form the enterprise is no cure. This is the sort of “open-ended” description of the enterprise that courts routinely reject on vagueness grounds. *E.g.*, *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995) (holding that plaintiff’s complaint, which describes the enterprise as consisting of three defendants plus “at least” four other entities, was too vague to satisfy the notice requirement). In any event, merely removing some defendants from the alleged enterprise does not solve a

mandatory person/enterprise distinction.²⁰³ Accordingly, a failure to distinguish the RICO persons from the RICO enterprise should—despite *Boyle*—continue to vitiate a plaintiff’s RICO claim alleged under § 1962(c).²⁰⁴

The Seventh Circuit’s decision in *Crichton v. Golden Rule Insurance Co.* is particularly illustrative of the problems inherent in open-ended or otherwise casually stated associational enterprise allegations.²⁰⁵ In *Golden Rule*, the plaintiff purchased insurance under a “master policy” offered to members of a consumer and traveler organization (the “Federation”).²⁰⁶ He later sued the insurer, Golden Rule, on behalf of a nationwide class. The gist of his claims, which included a RICO claim, was that Golden Rule did not adequately disclose the cost of his premiums.²⁰⁷ In connection with his RICO claim, the plaintiff alleged, alternatively, that Golden Rule and the

plaintiff’s “identity” problem. See *Williamson*, 224 F.3d at 447; *Andrews*, 176 F. Supp. 2d at 687.

203. *Andrews*, 176 F. Supp. 2d at 687 (holding that because defendant-charitable corporations and individuals overlapped with alleged members of association-in-fact, enterprise element failed); see also *Williamson*, 224 F.3d at 447 n.16 (“To get around having a corporation named as both a RICO defendant and a RICO enterprise, many plaintiffs have charged the corporation as being part of an association-in-fact enterprise and also as a RICO defendant. Courts have roundly criticized this formulation.”); *Bradley v. Phillips Petroleum Co.*, 527 F. Supp. 2d 625, 652 (S.D. Tex. 2007) (“Having failed to allege an external enterprise, the . . . Plaintiffs have necessarily asserted that Defendants are ‘employed by or associated with’ themselves. Such identity of elements is impermissible for a RICO claim under § 1962(c).”).

204. See *FMC Int’l A.G. v. ABB Lummus Global, Inc.*, No. H-04-3896, 2006 WL 213948, at *9 (S.D. Tex. Jan. 25, 2006) (“FMC’s own allegations defeat the distinctiveness requirement under § 1962(c). FMC alleges in its Original Federal Complaint that ABB and Heerema are RICO persons, and that the JV, which is a joint venture between ABB and Heerema, is a RICO enterprise. FMC then alleges that ABB and Heerema ‘have acted as RICO enterprises’. Because FMC’s allegations demonstrate that there is no distinction between the RICO persons and the purported RICO enterprise(s), FMC has not stated a RICO viable claim under § 1962(c).”). The only exception to the nonidentity rule is that a living person can be a defendant and part of an association-in-fact:

There is a slim exception to the rule that the RICO person must be separate from the RICO enterprise. Courts have routinely required a distinction when a corporation has been alleged as both a RICO defendant and a RICO enterprise, but a similar requirement has not been mandated when individuals have been named as defendants and as members of an association-in-fact RICO enterprise. That rule does not apply here, as the . . . Plaintiffs’ claim only implicates the corporate defendants.

Bradley, 527 F. Supp. 2d at 652 n.52 (citation omitted) (internal quotation marks omitted) (dismissing RICO claims because, in part, plaintiffs had “not identified RICO persons separate from their alleged enterprise”).

205. 576 F.3d 392 (7th Cir. 2009).

206. *Id.* at 394.

207. *Id.* at 394-95.

Federation constituted an association-in-fact.²⁰⁸ The Court was unpersuaded, holding that “an association-in-fact enterprise must be meaningfully distinct from the entities that comprise it such that the entity sought to be held liable can be said to have controlled and conducted the enterprise rather than merely its own affairs.”²⁰⁹ Indeed, the plaintiff had “done no more than describe the ordinary operation of a garden-variety marketing arrangement between Golden Rule and the Federation[, which] is not what RICO penalizes.”²¹⁰ Accordingly, the Seventh Circuit rejected plaintiff’s theory, holding, “This is insufficient to state a RICO claim based on an association-in-fact enterprise.”²¹¹

D. Pleading Civil RICO Violations After Boyle

To show the existence of an enterprise as a separate RICO element, courts pre-*Boyle* would often hold that “[p]laintiffs . . . need to ‘plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts.’”²¹² Some version of this rule may yet remain even though *Boyle* has relaxed the standards for proving the structure of a RICO enterprise in the criminal context.²¹³ This is so because failure to show that the *enterprise* (as opposed to its individual members) has a function other than to effectuate the alleged scheme may still be fatal to a civil RICO claim.²¹⁴

208. *Id.* at 398-99.

209. *Id.* at 399.

210. *Id.* at 400.

211. *Id.*; see also *In re McCann*, 268 F. App’x 359, 366 (5th Cir. 2008) (stating that members of alleged association-in-fact were “merely partners in a scheme”); *Gray v. Upchurch*, No. 5:05-cv-210-KS-MTP, 2007 WL 2258906, at *4 (S.D. Miss. Aug. 3, 2007) (stating that an allegation that mortgage lenders “knew or should have known” that loans they made were part of fraudulent scheme was insufficient to establish existence of or control over enterprise); *Do v. Pilgrim’s Pride Corp.*, 512 F. Supp. 2d 764, 769 (E.D. Tex. 2007) (stating that “standard business arrangements” between agribusiness and bank did not constitute “continuous RICO enterprise”).

212. *Rivera v. AT & T Corp.*, 141 F. Supp. 2d 719, 726 (S.D. Tex. 2001) (emphasis added) (quoting *Elliot v. Foutas*, 867 F.2d 877, 851 (5th Cir. 1989)).

213. See discussion *supra* Part IV.A. At least one court has gone so far as to limit *Boyle* to jury instructions only. *CIT Group/Equip. Fin., Inc. v. Krones, Inc.*, No. 9-432, 2009 WL 3579037, at *8 n.10 (W.D. Pa. Sept. 16, 2009) (“Defendants’ reliance on the *Boyle* decision for the proposition that a plaintiff must plead structural features related to an association in fact enterprise [is] misplaced. The *Boyle* court addressed the inadequacy of a jury instruction, not a pleading.”).

214. See, e.g., *Tipton v. Northrop Grumman Corp.*, No. 08-1267, 2009 WL 2914365, at *11-12 (E.D. La. Sept. 2, 2009) (holding that the plaintiffs’ failure “to allege the existence of an enterprise separate and apart from the pattern of racketeering . . . is fatal to [their] RICO claims”); *Rivera*, 141 F. Supp. 2d at 726 (“Plaintiffs’ allegations establish exactly the opposite: that any association between Tele-Communications, Inc., AT & T Corporation, and Time Warner, Inc. exists merely for the purposes of providing cable services in exchange for

But even if not, *Boyle* leaves no doubt that an actionable association-in-fact enterprise must exhibit at least two distinct characteristics: namely, that it is an “ongoing organization” that functions as a “continuing unit.”

An “ongoing organization” is shown by the existence of some sort of structure.²¹⁵ To return to our running example, *Golden Rule*, where a plaintiff “has done little more than plead facts suggesting the existence of the marketing relationship between” two entities, the “structural” piece of the RICO puzzle will remain missing.²¹⁶ There, the plaintiff did not identify any structures that limited or guided the defendants in their execution of the alleged scheme, nor did he identify a mechanism for distributing the fruits of the alleged fraud apart from that typically found in ordinary insurance transactions (i.e., the insured gets an insurance policy, the insurer gets a premium, the marketers get a commission).²¹⁷ For the court, these pleading deficiencies suggested a lack of requisite organization in the alleged association-in-fact.²¹⁸

a monthly fee.”). After *Boyle*, however, some courts appear more willing to infer the existence of an enterprise “separate and apart” from the racketeering activities, as suggested by the Court. See *County of El Paso v. Jones*, No. EP-09-CV-00119-KC, 2009 WL 4730305, at *18 (W.D. Tex. Dec. 4, 2009) (finding that the plaintiff did sufficiently allege existence “separate and apart” from the alleged racketeering activities, but noting that “even if the County failed to allege an existence separate and apart from Defendants’ alleged racketeering activities, it is not clear that this would prove fatal to its claim”). “Because Defendants’ ‘consulting services’ organization functioned through its commission of the predicate racketeering acts, the evidence establishing the association-in-fact and the pattern of racketeering activity in the instant case may ‘coalesce.’” *Id.* (citing *Boyle v. United States*, 129 S. Ct. 2237, 2245 (2009)).

215. *Boyle*, 129 S. Ct. at 2244; *Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir. 1986).

216. *Golden Rule*, 576 F.3d at 399.

217. *Id.* at 398-99. But see *In re Actiq Sales & Mktg. Practices Litig.*, No. 07-4492, 2009 WL 2581717, at *4 (E.D. Pa. Aug. 21, 2009) (“Plaintiffs have not only alleged a decision-making structure that goes beyond surface descriptions of the enterprise and associate roles, but also details about the ongoing functions of the alleged enterprise, descriptions of monetary and other incentives used to attract speakers and other participants to the enterprise, specifics regarding the manner in which presentations are created to allegedly mislead physicians about the efficacy of Provigil and Gabitril for certain conditions, and how sales representatives were utilized in the course of Defendant’s national marketing scheme.”).

218. See *Elsevier Inc. v. W.H.P.R., Inc.* 692 F. Supp. 2d 297, 307 (S.D.N.Y. 2010) (“In this post-*Twombly* era, I conclude that a plaintiff must allege something more than the fact that individuals were all engaged in the same type of illicit conduct during the same time period.”). But see *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM (CTX), 2009 WL 3053711, at *3 (C.D. Cal. Sept. 17, 2009) (finding that “[p]laintiffs had adequately alleged an ongoing organization, and that a RICO enterprise could arise from a contractual relationship for ordinary financial services” as supported by the holding in *Boyle* that “an association-in-fact enterprise need not have an ascertainable structure beyond that inherent in its pattern of racketeering activity”).

A plaintiff must also plead facts demonstrating a “continuing unit.”²¹⁹ Thus, as with the “ongoing organization” element, a plaintiff must demonstrate a structure sufficient to satisfy the “continuing unit” element.²²⁰ To demonstrate the requisite enterprise continuity, a plaintiff must allege facts showing that, for instance, key personnel remained in positions throughout the operative period of the alleged scheme.²²¹ Together, these pleading requirements should ensure that an association-in-fact is a true “enterprise” and not a mere coordination of individual acts and aims.

Even if a plaintiff sufficiently pleads the existence of an enterprise, his RICO claims will still fail if he does not allege that the “defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their *own* affairs.”²²² This requires the plaintiff to plead and prove that each of the defendants participated in the “operation” or “management” of the enterprise to the degree that it has some part in directing the [enterprise’s] affairs.²²³ This requires more than “a formulaic recitation of the elements of a cause of action,” which—as noted above—is insufficient under *Twombly*.²²⁴ And it stretches the RICO fabric too far to suggest—as did the *Golden Rule* plaintiff—that merely providing a service through a marketing arrangement with otherwise unrelated corporate groups constitutes the “conduct” of an enterprise.²²⁵ One reason that this element failed with respect to the insurer in *Golden Rule* is that the acts alleged against

219. *E.g., Boyle*, 129 S. Ct. at 2246; *Brunig v. Clark*, 560 F.3d 292, 297 (5th Cir. 2009); *Jones*, 2009 WL 4730305, at *19.

220. *See Shaffer*, 794 F.2d at 1032 (“The RICO enterprise must have a common or shared purpose and continuity of structure and personnel.”).

221. *See Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 244 (5th Cir. 1988) (“[T]he enterprise . . . must be one that . . . functions as a continuing unit.” (internal quotation marks omitted)), *cert. denied*, 498 U.S. 1079 (1989); *see also Calcasieu Marine Nat’l Bank v. Grant*, 943 F.2d 1453, 1462 (5th Cir. 1991) (“The enterprise must have continuity of its structure and personnel . . .”).

222. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

223. *See Able Sec. & Patrol, LLC v. Louisiana*, 569 F. Supp. 2d 617, 629 (E.D. La. 2008) (showing plaintiff must plead “how *each* . . . defendant[] performed acts in furtherance of the enterprise” (emphasis added)).

224. *Watts v. Allstate Indem. Co.*, No. S-08-1877 LKK/GGH, 2009 WL 1905047, at *6 (E.D. Cal. July 1, 2009) (internal quotation marks omitted); *see also Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 09-11529, 2010 WL 931864, at *22-25 (E.D. Mich. Mar. 11, 2010) (dismissing plaintiffs’ § 1962(c) claims for failure to meet the “operations or management test” under *Reves* since plaintiffs’ allegations that each Defendant “conducted or participated, directly or indirect [sic], in the conduct of [an] enterprise’s affairs” were conclusory under *Iqbal* (alteration in original)).

225. *Critchton v. Golden Rule Ins.*, 576 F.3d 392, 399-400 (7th Cir. 2009) (“Allegations that a defendant had a business relationship with the putative RICO enterprise or that a defendant performed services for that enterprise do not suffice.”).

it—namely selling insurance and collecting a premium—had no “nexus” with the management or operation of the alleged enterprise.

In *United States v. Cauble*, the Fifth Circuit devised a *conjunctive* three-part test for determining whether a sufficient nexus exists among the enterprise, the defendant, and the pattern of racketeering: “(1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant’s position in the enterprise facilitated his commission of the racketeering acts[;] and (3) the predicate acts had some effect on the lawful enterprise.”²²⁶ Accordingly, there must be a nexus among the enterprise, the defendant, and the pattern of racketeering activity that includes an “enterprise-racketeering nexus . . . distinct from the defendant-racketeering connection.”²²⁷ Thus, under the *Golden Rule* example, even if one were to assume that selling insurance at inadequately disclosed rates constitutes “racketeering,” those acts lack any meaningful nexus to the operation of the alleged enterprise. For as the *Golden Rule* court held, allegations that an insurer offered its services through a multiparty insurance marketing arrangement are “insufficient to state a claim that [the insurer] controlled the operation or management of [an enterprise].”²²⁸

To summarize: *Boyle* has made it much less difficult to plead an association-in-fact enterprise. This does not mean, however, that all previous enterprise standards are out the window. In fact, given the strict pleading standards ushered in by *Twombly*, it is likely that the lower courts will continue to police civil RICO cases for claims that are little more than thinly disguised ordinary tort claims.

V. CONCLUSION

As the title of this Article suggests, the Supreme Court sorted out an area of RICO jurisprudence that has been a mess for at least twenty years, yet undone an area that was fairly well settled. We now know that a plaintiff has standing to bring a RICO fraud claim if she can show that the fraud—no matter to whom directed—caused money (or some other benefit) to move directly from her pocket into the defendant’s pocket. We also know that in such a claim, reliance, though a perhaps useful evaluative tool, is not an element of a civil RICO claim and is best discarded as a point of argument in most cases. To the contrary, we have lost the certainty brought by hundreds of

226. 706 F.2d 1322, 1332-33 (5th Cir. 1983); see also Gordon, *Crimes That Count Twice*, *supra* note 5, at 184-89 (discussing the *Cauble* nexus test).

227. *Cauble*, 706 F.2d at 1332.

228. *Golden Rule*, 576 F.3d at 399.

lower court cases telling us that an association-in-fact enterprise has to have an existence separate and apart from the alleged pattern of racketeering. Plaintiffs and defendants in civil RICO litigation will no doubt spill much ink in the attempt to, on the one hand, label conspiracies as “enterprises” and, on the other hand, to confine the concept of enterprise to something that looks more or less like the lay conception of a criminal gang.